Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Commercial Leased Access	)	MB Docket No. 07-42
	)	
Modernization of Media Regulation Initiative	)	MB Docket No. 17-105

REPLY COMMENTS OF CHARTER COMMUNICATIONS, INC.

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Charter Communications, Inc. ("Charter") respectfully submits these Reply Comments in the above-captioned proceedings.[1]

INTRODUCTION AND SUMMARY

Charter strongly supports the comments of NCTA – The Internet & Television Association ("NCTA") in this proceeding.[2] As NCTA explains, the video marketplace has witnessed dramatic changes since the leased access provisions were enacted, and consumers now have access to a wide variety of video programming—not just from cable providers but from a large, and growing, number of platforms. In light of these changes to the video marketplace, the leased access regime is not necessary, if indeed it ever was, to promote either diversity or competition in the marketplace.

Charter also agrees with NCTA's thorough analysis of why, "[i]n light of recent Supreme Court precedent as well as the changes to the video marketplace" the leased access regime "can no longer be squared with the First Amendment."[3] Charter urges the Commission to make such

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[1] *Leased Commercial Access; Modernization of Media Regulation Initiative*, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 19-52 (rel. June 7, 2019) ("*Second FNPRM*").
[2] *See generally* Comments of NCTA – The Internet & Television Association (July 22, 2019) ("NCTA Comments").
[3] *Id.* at 12-13.

a finding, given the Commission's acknowledgement of the First Amendment concerns raised by leased access.[4] Recognizing that the Commission nonetheless has a statutory obligation to implement the leased access requirements, Charter also urges the Commission to reduce the unconstitutional regulatory burdens that leased access needlessly imposes on cable operators by allowing cable operators to charge market rates for leased access or by substituting a tier-specific implicit fee calculation for the current cross-tier approach that dates back more than 20 years. While neither approach will eliminate the First Amendment problems associated with the leased access regime, either approach will at least mitigate the burdens those rules place on cable operators.

I. THE COMMISSION HAS A CONSTITUTIONAL DUTY TO CONSIDER THE FIRST AMENDMENT IMPLICATIONS OF LEASED ACCESS.

As Charter has previously explained,[5] the Commission has an obligation to thoroughly assess the constitutionality of any leased access requirements it adopts and enforces. Charter applauds the Commission's attention to this issue and its solicitation of comments concerning whether the leased access requirements can withstand First Amendment scrutiny.[6] Indeed, the Commission has an obligation to consider the constitutionality of the leased access regime notwithstanding the fact that the underlying leased access obligation was enacted by Congress. As a former FCC Chairman observed decades ago, "[t]his Commission has an obligation to continually re-explore—for both our own benefit and for the benefit of Congress—any doctrine that precludes full exercise of journalistic rights by the electronic media."[7] This duty exists by virtue of the FCC's role as an expert independent regulatory agency with jurisdiction over media

[4] *Second FNPRM* at ¶¶ 41, 47.
[5] *See generally* Reply Comments of Charter Communications, Inc. (Aug. 13, 2018).
[6] *Second FNPRM* at ¶¶ 41, 47.
[7] *Inquiry into the General Fairness Doctrine Obligations of Broadcast Licensees*, 49 Fed. Reg. 20317, 20344 (May 14, 1984) (separate statement of Commissioner James H. Quello).

protected by the First Amendment,[8] and this Commission has properly recognized its responsibility to consider the First Amendment implications of leased access and uphold the Constitution.

A. As Part of its Constitutional Review, the Commission Must Consider Changes in Technology.

The FCC's constitutional review of the leased access rules must include an analysis of the current marketplace and contemporary technology. Indeed, the Supreme Court has recently reaffirmed that its own constitutional rulings must be continually reassessed in light of such changes. For example, in *South Dakota v. Wayfair, Inc*.,[9] the Court affirmed that it should "focus on rules that are appropriate to the twenty-first century, not the nineteenth" century.[10] The Court held that the Commerce Clause could no longer be interpreted to preclude states from collecting taxes simply because a business lacked a "physical presence" in the jurisdiction, because "dramatic technological and social changes" had rendered the physical presence rule "anachronistic."[11]

In *Carpenter v. United States* the Court also held that the Fourth Amendment requires the government to obtain a search warrant in order to use cell tower location data to track suspects, notwithstanding earlier rulings that obtaining information "shared" with phone companies was not a "search" requiring a warrant.[12] Writing for the Court, Chief Justice Roberts explained that the government's position "fails to contend with the seismic shifts in digital technology" that

[8] It is beyond dispute that "cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994).
[9] 138 S. Ct. 2080 (2018).
[10] *Id*. at 2092 (citation omitted).
[11] *Id*. at 2095.
[12] 138 S. Ct. 2206 (2018) (limiting the reach of *Smith v. Maryland*, 442 U.S. 735 (1979)).

make use of such information far more intrusive.[13] He observed that "when *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements."[14]

The duty to continually reassess constitutional principles applies with special force to the Commission—an agency that necessarily "works in the shadow of the First Amendment."[15] And it is difficult to imagine a business sector that has experienced greater seismic shifts in digital technology than the communications industry generally and video programming distribution specifically. A leased access regime can no longer be justified by cable's supposed "bottleneck monopoly power"—which does not exist in today's marketplace (if it ever did).[16]

B. The D.C. Circuit's Prior Constitutional Evaluation of the Leased Access Requirements No Longer Withstands First Amendment Scrutiny.

In the twenty-two years since the D.C. Circuit decided *Time Warner Entertainment Co*.,[17] upholding the leased access provisions under the First Amendment, both the underlying First Amendment jurisprudence and the technology of the media landscape to which that jurisprudence applies have changed dramatically. These changes make it imperative that the Commission reevaluate these legal and factual factors as the Commission considers reforming the existing leased access rules.

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[13] *Id*. at 2219.
[14] *Id*.
[15] *FCC v. Fox Tel. Stations, Inc*., 556 U.S. 502, 556 (2009) (Breyer, J., dissenting).
[16] *See, e.g.*, *Comcast Cable Commc'ns v. FCC*, 717 F.3d 982, 994 (D.C. Cir. 2013) (Kavanaugh, J. , concurring) ("[I]n light of the Supreme Court's precedent interpreting the First Amendment and the massive changes to the video programming market over the last two decades, the FCC's interference with . . . editorial discretion [under Section 616] cannot stand.").
[17] 93 F.3d 957 (D.C. Cir. 1996).

Changes in legal doctrine since *Time Warner Entertainment Co*. was decided are alone sufficient to require the Commission to reconsider the constitutional basis underlying the leased access regime. Subsequent to that 1996 decision, the Supreme Court clarified that plaintiffs raising facial First Amendment challenges to a statute may prevail if they establish that the challenged statutory provision would restrict or chill a substantial amount of speech relative to the provision's legitimate sweep.[18] Even more to the point, the Supreme Court has recently reiterated that strict scrutiny applies to any law that "defin[es] regulated speech by its function or purpose" so long as that law "cannot be justified without reference to the content of the regulated speech"—and even if the law is *viewpoint* neutral.[19]

As a result, the leased access rules must be subject to "strict" scrutiny.[20] Even assuming, *arguendo*, that the leased access rules trigger "intermediate" scrutiny, the standard applied by the D.C. Circuit in *Time Warner*, the leased access regime still cannot stand. "[I]f the Government [can] achieve its interests in a manner that does not restrict speech, or that restricts less speech, [it] must do so."[21] The Commission is constitutionally required to adopt rules that avoid any undue restrictions on cable operators' First Amendment rights.[22]

Of particular relevance to the First Amendment analysis, the media environment itself has been transformed—and any notion existing at that time that cable operators were

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[18] *United States v. Stevens*, 559 U.S. 460, 473 (2010).

[19] *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227, 2230 (2015).

[20] NCTA's comments also explain why the leased access regime also expresses impermissible speaker preferences. *See* NCTA Comments at 14-15. Indeed, under more recent Supreme Court precedent, the leased access regime involves impermissible speaker- and content-based discrimination and subjects cable operators to disfavored treatment, thereby triggering strict scrutiny. *See, e.g., Nat'l Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (explaining that the Court's "precedents are deeply skeptical of laws that distinguis[h] among different speakers, allowing speech by some but not others" (internal quotation marks omitted)); *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 641 (5th Cir. 2012) (applying strict scrutiny to franchising rules that targeted a small number of cable providers).

[21] *Thompson v. W. States Med. Ctr*., 535 U.S. 357, 371 (2002).

[22] *See, e.g., Cigar Ass'n of Am. v. FDA*, 317 F. Supp. 3d 555, 562 (D.D.C. 2018) (compelled disclosures must be no broader than necessary even under lesser degrees of scrutiny).

"gatekeepers" has been debunked by the nature and magnitude of the intervening transformation. The Internet did not exist when leased access was created by Congress, but it has now clearly revolutionized the communications industry. Programmers, both big and small, can today place programming on the Internet and convey their message to the public without the need for leased access. Indeed, programmers can now reach any household with an Internet connection. The prospective audience for video programming is in no way dependent on cable service.

The Commission need look no further than its own annual Video Competition Reports to determine that the factual basis for the leased access rules no longer exists. Between the first such Report in 1994 and the most recent version issued in 2018, entirely new categories of competitors have emerged that allow independent video programmers today to bypass cable service entirely.[23] Neither the Internet nor Online Video Distributors ("OVDs") are even mentioned in the 1994 Report—which is hardly surprising as neither had yet developed as a source for video distribution.[24] Leaving aside the emergence of competing MVPDs, cable operators now see OVDs as primary competitors.[25] In short, the Commission's own Video Competition Reports document how the factual justification underlying leased access requirements has evaporated.[26]

Internet access, along with competition to incumbent cable operators from both MVPDs and OVDs, undermine the constitutionality of leased access. A statutory obligation predicated on an entirely different media landscape cannot avoid constitutional scrutiny under today's

[23] *First Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd 7442 (1994); *Eighteenth Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 32 FCC Rcd 568 (2017) ("*Eighteenth Report*").
[24] *Eighteenth Report* ¶¶ 130-138.
[25] *Id*. ¶¶ 55-58.
[26] *See also* NCTA Comments at 3-9 (describing myriad ways in which the video marketplace has changed since the leased access provisions were originally adopted).

marketplace. As NCTA's comments explain in detail, the existing leased access regime fails even intermediate scrutiny because it: (a) no longer directly or materially advances a substantial governmental interest; and (b) is not appropriately tailored under present circumstances.[27] Most of the other commenters in this proceeding agree. Only the Alliance for Communications Democracy ("ACD") attempts to defend the constitutional analysis of the leased access regime.[28] Its comments do no more than simply invoke the D.C. Circuit's decision in *Time Warner* to argue that the leased access provisions remain constitutional and subject to only intermediate scrutiny[29]—but that decision's analysis has been superseded by numerous Supreme Court decisions.[30] ACD's comments also refuse to acknowledge the impact of the substantial changes in the video marketplace that render the leased access regime unconstitutional.

Free Press also argues that any marketplace changes are irrelevant because, Free Press claims, the Commission cannot question the constitutionality of the leased access rules mandated by Congress.[31] As the Commission itself has acknowledged, however, the Commission has a duty to consider constitutional concerns when determining how to implement Congress's statutory directives.[32] And even Free Press concedes that consumers enjoy an "increase in choices on other platforms."[33] That cable subscribers can access those choices, should they elect

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[27] *See id.* at 18-21.

[28] *See* Comments on Second Further Notice of Proposed Rulemaking of the Alliance for Communications Democracy at 3-12 (July 22, 2019).

[29] *Id.* at 3-4.

[30] *See* NCTA Comments at 15-18.

[31] Comments of Free Press on Second Further Notice of Proposed Rulemaking at 3-6, (July 22, 2019) ("Free Press Comments").

[32] *See, e.g.*, *Carriage of Digital Television Broadcast Signals*, Fifth Report and Order, 27 FCC Rcd 6529, 6537 (2012) (concluding that "the dramatic changes in technology and the marketplace over the past five years" render less certain the constitutional foundation for an inflexible rule compelling carriage of broadcast signals in both digital and analog formats" and applying the canon of constitutional avoidance when considering how to implement those Congress's statutory directives).

[33] Free Press Comments at 5.

to do so, undermines the government's purported interest in fostering a diverse set of video programming sources through cable regulation. The fact that programmers now are able to reach consumers through mediums other than the cable system also directly rebuts the "bottleneck" rationale that underpinned the D.C. Circuit's prior analysis of the leased access rules.[34]

Justice Kennedy observed nearly a decade ago that "there may be instances when it becomes apparent to an agency that the reasons for a longstanding policy have been altered by discoveries in science, advances in technology, or by any of the other forces at work in a dynamic society."[35] At a minimum, the Commission has an obligation to take actions that are within its jurisdiction and consistent with the Constitution.[36] Indeed, the implementing agency can and must interpret the statute to avoid constitutional infirmity (including adopting a saving construction). Leased access regulations that are not statutorily mandated should be eliminated.

C. The Commission Must Adopt the Least Constitutionally Intrusive Approach.

The statute itself requires the Commission to minimize the constitutional problems inherent to leased access. Section 612 expressly mandates that the Commission promulgate implementing rules so that any leased access obligation is "consistent with the growth and development of cable systems."[37] The governing statute further instructs the Commission to ensure that "the price, terms, and conditions of [leased access] use . . . are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system."[38] Given Congress's obvious commitment to minimizing the adverse effects of leased access on cable operators, and the constitutional concerns outlined

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[34] *Time Warner*, 93 F.3d at 969.
[35] *Fox Tel. Stations*, 556 US at 535 (Kennedy, J., concurring).
[36] *See, e.g., Meredith Corp. v. FCC*, 809 F.2d 863, 874 (1987) ("Federal officials are not only bound by the Constitution, they must also take a specific oath to support and defend it.").
[37] 47 U.S.C. § 532(a).
[38] *Id*. § 532(c)(1).

above, the Commission has a heightened responsibility (and the necessary discretion) to set the terms and conditions for leased access to avoid and/or minimize regulatory burdens, particularly where independent programmers have alternative avenues for reaching potential viewers.

Charter respectfully submits that the Commission should exercise its discretion in this rulemaking to minimize the serious constitutional problems associated with leased access requirements. In light of the radically changed conditions described above, the Commission should, if nothing else, adopt the regulatory changes advanced in NCTA's Comments.[39]

II. THE COMMISSION SHOULD MODIFY LEASED ACCESS TO MINIMIZE THE BURDENS ON CABLE OPERATORS.

Charter agrees with NCTA that in light of the First Amendment concerns, the state of the current marketplace, and the flexibility afforded by the statute itself, the Commission must "implement the statute in the way that mitigates the First Amendment burdens to the extent possible."[40] The Commission has proposed to modify its approach to calculating leased access fees by adopting NCTA's previous suggestion to "make leased access fee calculations specific to the tier on which the programming will be carried."[41]

Charter strongly supports this proposal. While eliminating the rate cap entirely and relying on marketplace negotiations would further reduce (but not eliminate) the First Amendment burdens associated with leased access,[42] we recognize that the Commission may feel constrained by the statute to set a "maximum reasonable rate[]."[43] Allowing the calculation of tier-specific implicit fees, in the place of the previous cross-tier approach that the Commission

[39] Charter would again encourage the Commission, in its next report to Congress on the current state of the video marketplace, to include a recommendation that the leased access statute be repealed.
[40] NCTA Comments at 21.
[41] *Second FNPRM* at ¶ 45.
[42] NCTA Comments at 21-22.
[43] 47 U.S.C. § 532(c)(4)(A)(i).

has historically employed, would better reflect the value to the leased access programmer of carriage on the tier on which it is actually being carried. It would also simplify calculation of leased access fees and better align with the operator's unregulated marketing decisions regarding service tier composition and rates.

Notably, in response to the Commission's request for comment on potential modifications to the leased access rate formula,[44] no commenters oppose the Commission's proposal to make leased access fee calculations tier-specific. In fact, the only commenter other than NCTA to propose specific changes to the leased access fee calculation has proposed additional modifications that would only further lessen the burdens on leased access providers.[45] Given the constitutionally flawed status of leased access, the Commission certainly should not add any new leased access obligations now. Thirty-four years after Congress first imposed leased access requirements on the cable industry, Section 612 itself is constitutionally infirm. Any new regulatory burdens simply could not survive constitutional scrutiny.

[44] *Second FNPRM* at ¶¶ 45-46.

[45] *See* Further Comments of ACA Connects – America's Communications Association (July 22, 2019); *see id.* at 2 (explaining that ACA Connects "do[es] not object to the Commission's proposal" to "calculate the 'average implicit fee' for leased access based on the tier on which the leased access programming actually will be carried" but that ACA Connects "believe[s] that additional steps should be taken to reduce administrative burdens, particularly for smaller entities").

CONCLUSION

Charter appreciates the Commission's acknowledgement of the potential First Amendment implications of the leased access regime. In light of the current media landscape, which has been dramatically transformed by the Internet, Charter urges the Commission to take all steps within its regulatory authority to minimize the regime's continuing constitutional infirmity.

Respectfully submitted,

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